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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE CITY AND COUNTY OF SAN
FRANCISCO, CALIFORNIA and THE PEOPLE
OF THE STATE OF CALIFORNIA, Acting by
and through San Francisco City Attorney DENNIS
J. HERRERA,

Plaintiffs,

v.

PURDUE PHARMA L.P., et al.

Defendants.

Case No. 3:18-cv-07591-CRB-JSC

JOINT STATUS UPDATE

Judges: Hon. Charles R. Breyer and
Jacqueline Scott Corley

Courtroom: Via Videoconference

Hearing Date: December 18, 2020

Hearing Time: 9:00 a.m.

1 The parties respectfully submit this Joint Status Update in advance of the Court's
2 discovery conference scheduled for December 18, 2020 at 9:00 a.m.

3 **I. JOINT STATEMENT REGARDING SCHEDULE AND DISPUTE RESOLUTION**

4 The parties jointly report on a number of case developments that have taken place since
5 the last conference with the Court.

6 **A. Deposition Protocol**

7 On November 20, 2020, the parties submitted a stipulation and proposed order on a
8 remote deposition protocol which, among other things, sets forth the proposed procedure for
9 depositions during the pandemic, establishes a further deadline (January 15, 2021) for the parties
10 to present propose numerical limitations on depositions, and allows each side to take up to 10
11 depositions in the interim. Dkt. 387. The Court has not yet entered the order, and the parties are
12 prepared to address any questions the Court may have about it.

13 **B. Designation of Remand Record**

14 On December 2, 2020, the parties filed a Joint Stipulation of Designation of Remand
15 Record Pursuant to JPML Rule 10.4(a). Dkt. 391.

16 **C. Briefing on Mode of Trial**

17 On November 20, 2020, and December 10, 2020, respectively, Plaintiff and Defendants
18 filed their simultaneous opening and responsive briefs "addressing whether the Court must hold a
19 bench or jury trial on" Plaintiff's UCL, FAL, and nuisance claims (the claims remaining after the
20 motion to dismiss order). *See* Dkts. 385, 387, 395-96. Plaintiff takes the position that all three
21 claims may be tried by the Court; Defendants argue that they must be tried by a jury.

22 **D. Order re Motion to Certify Order for Interlocutory Appeal**

23 The Distributor Defendants moved the Court to certify portions of its motion to dismiss
24 Order for interlocutory appeal under 28 U.S.C. § 1292(b). Dkt. 327. The Court denied the
25 motion on November 9, 2020. Dkt. 344.

26 **E. Order re Endo International's Motion for Reconsideration**

27 Defendant Endo International plc, moved for reconsideration of the order denying its
28 motion to dismiss for lack of personal jurisdiction. Dkt. 321. The Court denied the motion on

December 7, 2020. Dkt. 392.

F. Teva's Petition for Writ of Mandamus

Teva Pharmaceutical Industries Ltd. filed a petition for writ of mandamus, asking the Ninth Circuit to reverse the Court's denial of Teva's motion to dismiss for lack of personal jurisdiction. Plaintiff's response is due on December 23, 2020.

G. Related Case

On October 14, 2020, a separate case, *Smith v. Walgreens Boots Alliance, Inc.*, No. 20-cv-05451-CRB, was related to this one and assigned to Judge Breyer. Walgreens filed its Motion to Dismiss on November 20, 2020. Dkt. 35. Plaintiff's opposition brief is due December 29, 2020, and Walgreens' reply brief is due January 12, 2021. The hearing date for the motion is scheduled for January 28, 2021.

H. Discovery Motions

The parties have briefed a number of disputes pursuant to the revised resolution protocol outlined in Discovery Order No. 2. The disputes are identified in the chart below for ease of reference.

Moving Party	Responding Party	Dispute	Dkt.
Plaintiff	McKesson	Geographic and temporal scope of McKesson's document productions	397
Manufacturer Defendants	Plaintiff	Plaintiff's responses to certain interrogatories	399
Manufacturer Defendants	Plaintiff	Plaintiff's responses to RFPs on claims and encounter data and mortality records	400
All Defendants	Plaintiff	Deadline for further supplementation re abatement categories	401
Plaintiff	Allergan	Allergan's responses to RFPs re settlement with Teva	403
Plaintiff	Endo	Temporal scope, custodians, and other issues relevant to Plaintiff's RFPs	

II. PLAINTIFF'S STATEMENT

The parties have continued to work diligently since the last status conference. This statement outlines the status of issues the parties have resolved and those that will require the

1 Court's input.

2 **A. Plaintiff's Discovery Efforts**

3 **1. PFS Amendment**

4 Plaintiff served a Third Amended Plaintiff Fact Sheet on November 6, 2020, and a Fourth
5 Amended Plaintiff Fact Sheet on December 11, 2020. The Third Amended Plaintiff Fact Sheet
6 added specificity to the categories of abatement the People seek and revised certain responses to
7 reflect the dismissal of the City and County of San Francisco as a party to the case. The Fourth
8 Amended Fact Sheet reflects amendments to certain categories of information requested by
9 Defendants, including the approximate date on which the People were first injured, additional
10 specificity as to the forms of injunctive, legal, and equitable relief sought, and further clarification
11 of the departments relevant to the People's proposed categories of abatement and the employees
12 whose documents are within the People's possession, custody, or control.

13 **2. Plaintiff's Ongoing Production**

14 Since the last status conference, Plaintiff has produced an additional 58,695 documents,
15 comprising 264,027 pages, which brings Plaintiff's total production to 157,739 documents and
16 868,396 pages. These productions include responsive documents from a non-custodial database
17 from the Department of Public Health ("DPH") as well as emails collected from 23 custodians
18 across eight San Francisco departments: DPH, the Office of the Medical Examiner, the Police
19 Department, the Fire Department, the Department of Homelessness and Supportive Housing,
20 the Department Public Works, the Adult Probation Department, and the Library. Plaintiff
21 continues to collect and review documents from additional custodians and databases identified
22 to Defendants, and production of those documents will continue on a rolling basis.

23 **B. Defendants' Productions**

24 As indicated in the previous submission, certain Defendants have deemed produced in
25 this action documents produced in other related cases in response to Plaintiff's requests for
26 production, but many have refused to identify with sufficient specificity the purportedly
27 responsive documents in those productions. A number of defendants have also produced zero
28 documents—or very close to it—collected specifically for this case, including Allergan (0

documents), Noramco (0 documents), Teva (0 documents) and Walgreens (6 documents).

C. Schedule for Expert Reports

Shortly after the last conference before the Court, Judge Breyer entered the Order re Joint Status Update, which held that the “parties shall simultaneously exchange initial expert reports on June 11, 2021 and rebuttal reports on July 16, 2021.” Dkt. 356. Five days later, Your Honor entered Discovery Order No. 2, which did not reference Judge Breyer’s Order re Joint Status Update but set a deadline of April 16, 2021, for “Plaintiff’s expert disclosures.” Dkt. 382 at 2. These deadlines appear to conflict, and it is unclear to Plaintiff which one is operative.¹

Plaintiff respectfully submits that if the April deadline currently controls, then that deadline should be vacated and the issue revisited at a later date. Several considerations inform this suggestion.

First, Defendants’ interest in early expert disclosures will likely be satisfied by Plaintiff’s commitment to providing even more detail on the categories for which it intends to seek abatement prior to serving expert reports. The initial justification for advancing Plaintiff’s expert deadline was to address Defendants’ purported need for further details to inform their fact discovery on abatement. Plaintiff maintains that this is unnecessary for a host of reasons addressed in briefing before the Court. *See* Dkt. 401. Regardless, in the spirit of compromise, Plaintiff has committed to providing even more detail through a further PFS amendment. Defendants complain below that none of the PFS amendments “provides anything close to an expert disclosure on remedies”—this is true and precisely the point. The PFS was never intended to—and simply cannot, for a host of reasons—substitute for expert reports. That’s not what it is for. What it can and will provide, however, is all the information Defendants need to propound any legitimate fact discovery. Plaintiff therefore believes that Defendants’ interest in early expert disclosures will be moot, and that the most prudent course of action is to either ratify the June deadline reflected in the Order re Joint Status Update or to vacate the expert report deadlines set forth in Discovery Order No. 2 and revisit the issue following Plaintiff’s further disclosures.

¹ Shortly after Your Honor issued Discovery Order No. 2, Plaintiff asked Defendants to join an email to the Courtroom Deputy seeking clarification. Defendants refused and advised that, in their view, the “appropriate way” to raise this issue “is via the next status conference statement.”

1 Second, disclosing expert reports before the close of fact discovery has the potential to
 2 create more problems than it solves, as additional post-expert fact discovery may require
 3 Plaintiff's experts to issue supplemental reports accounting for that additional discovery. *See*
 4 Fed. R. Civ. P. 26(e). This sequence would also be inconsistent with the procedure adopted in
 5 other opioid case tracks and arguably in tension with the spirit of Fed. R. Civ. P. 26(a)(2)(D)(i),
 6 which sets a default expert disclosure deadline just 90 days before trial.

7 Third, since the last conference, the Track 3² trial previously set for May 2021 has been
 8 continued to October 2021, and the plaintiffs' expert reports in that track will—subject to
 9 confirmation from the court—be due on April 16, 2021, the same date that Your Honor proposed
 10 for the People's expert reports in this case (and 28 days after the close of all fact discovery in that
 11 case). Although no experts have been disclosed in either track, it should come as no surprise to
 12 Defendants here that there is likely to be considerable overlap between the Track 3 experts—
 13 many of whom were disclosed and vetted in previous tracks—and those who will be used in this
 14 case. The expert reports are detailed and labor-intensive, and it would be inefficient and
 15 unnecessarily burdensome to require the experts to prepare reports for two jurisdictions
 16 simultaneously. In addition, simultaneous plaintiff reports would complicate subsequent expert
 17 deposition scheduling for both plaintiffs and defendants.

18 Defendants' suggestion below that this is a conflict “of Plaintiff's own making” is entirely
 19 misleading, and their accusation that Plaintiff manufactured a conflict for strategic advantage is
 20 unbecoming and untrue. Yes, an attorney representing the People participated in the negotiations
 21 of the Track 3 deadlines, but the Track 3 plaintiffs initially proposed expert disclosure deadlines
 22 in mid-March and modified their proposal to accommodate input from the special master and,
 23 importantly, the *defendants'* insistence that the schedule allow more time for fact discovery.
 24 Moreover, the proposal was made at a time when—because Defendants requested that the parties
 25 wait to seek clarification—the operative deadline in this case remained unclear.

26
 27
 28 ² Track 3 or “CT3” refers to the case before Judge Polster brought by two counties in Ohio
 against the retail pharmacies in their capacities as dispensers (as opposed to distributors).

1 **D. Other Matters Likely to Need the Court’s Attention**

2 **1. Walgreens’ Dispensing Data**

3 Plaintiff notes that Court intervention may soon be required with respect to the production
4 of Walgreens’ dispensing data, which will inform Plaintiff’s expert analysis and is a necessary
5 predicate for the “red flag analysis” that Defendants have demanded during the fact discovery
6 period. The parties continue to meet and confer about the contours of that data, including (1) the
7 geographic scope (whether data will be provided for all of California, only for San Francisco, or
8 something in between) and (2) whether the data will include the opioid codeine. Depending on
9 the outcome of these negotiations, Plaintiff may seek guidance from this Court in the near future
10 on one or both of these issues.

11 In the meantime, however, Walgreens has indicated that it has already prepared a data file
12 on a San Francisco-only basis that excludes codeine, but it refuses to produce that file while the
13 parties meet and confer about the remaining two issues. Walgreens has represented multiple
14 times that the San Francisco data is already one click away. Plaintiff would appreciate the Court
15 encouraging Walgreens to produce it now, which will allow Plaintiff to make significant progress
16 even while negotiating the contours of additional discovery.

17 **2. Criminal Record Information**

18 Plaintiff does *not* agree with Defendants that Court intervention should be necessary with
19 respect to a stipulation regarding criminal record information. California law provides
20 significant, non-negotiable protections for documents containing Criminal Offender Record
21 Information (“CORI”), such that the City Attorney’s Office and outside counsel cannot even
22 review documents containing CORI, let alone produce them to Defendants, without entry of a
23 court order. *See, e.g.*, Cal. Code Regs. tit. 11, § 703(b) (“Criminal offender record information
24 may be released, on a need-to-know basis, only to persons or agencies authorized by court order,
25 statute, or decisional law to receive criminal offender record information.”). What Defendants
26 characterize below as Plaintiff’s “refusal” to review documents containing CORI absent court
27 order is nothing more than Plaintiff’s insistence on following the law.

28 Defendants’ demands for documents containing CORI are unprecedented in Plaintiff’s

civil litigation experience. Nevertheless, Plaintiff has worked diligently to resolve this issue. Upon further examination of Plaintiff's legal obligations, Plaintiff proposed changes to the stipulation on December 3, 2020, to account for the requirement under California law that Defendant demonstrate a "compelling need" prior to the production of documents containing CORI. *See* Cal. Penal Code § 13300(c) ("The local agency may furnish local summary criminal history information, upon a showing of a compelling need . . ."). Plaintiff proposed that prior to the production of any documents containing CORI, the parties submit to the Court a proposed order with a simple two-column chart containing Plaintiff's description of the documents at issue in one column and Defendants' statement of need in another. Plaintiff is eager to submit the stipulation to the Court, which will facilitate review of documents. Defendants have not suggested any revisions and posed written questions about Plaintiffs' December 3 proposal for the first time in an email sent during the parties' meet and confer about this status report on December 16. Plaintiff responded in less than an hour and confirmed, per Defendants' request, how CORI is defined and that CORI protections implicate police records. Plaintiff is amenable to providing its proposal the Court for its own consideration.

E. Proposed Agenda for Status Conference

Plaintiffs submit that the status conference should address the issues outlined herein.

III. DEFENDANTS' STATEMENT

A. Matters Likely to Need the Court's Attention

The parties are meeting and conferring on a number of matters related to discovery requests that are not yet ripe for the Court's consideration. However, Defendants believe that the following issues may require the Court's attention as this case progresses.

1. Deadlines for Expert Reports

On November 12, 2020, Judge Breyer entered an order setting a deadline of June 11, 2021, for the simultaneous exchange of expert reports. Dkt. 356. On November 17, 2020, this Court set a deadline of April 16, 2021, for Plaintiff's initial expert disclosures, Dkt. 382, confirming the Court's oral order during the discovery conference on November 12, 2020. Plaintiff has suggested there is some ambiguity between these two orders, and some question

whether this Court's November 17 order is effective. Defendants disagree that there is any confusion on this point, as this Court is charged with handling discovery, and has issued an order consistent with the last status conference and the Court's statements in several status conferences regarding the importance of Plaintiff providing certain expert discovery early, so that Defendants can conduct necessary additional fact discovery.

Plaintiff's assertion that providing additional updates to the Plaintiff Fact Sheet solves this problem falls short. To date, Plaintiff has served *four* amended fact sheets, and none of them provides anything close to an expert disclosure on remedies. Indeed, Plaintiff has taken the position that it *cannot* provide key information until expert discovery, including information related to its purported abatement remedies. For that reason alone, Plaintiff's expert disclosures should remain due on the April 16, 2021, date set by the Court.

Moreover, Plaintiff's complaint that the April 16 deadline conflicts with the not-yet-entered MDL deadline for plaintiffs' expert reports in Track 3 ignores the fact that Plaintiff's counsel here also negotiated the new schedule in the MDL. The MDL Track 3 schedule was reached by agreement of the parties. In fact, Plaintiff's counsel here *proposed the April 16 deadline in Track 3, long after this Court had already entered the April 16 deadline here*. Any conflict in the two case schedules is of Plaintiff's own making and was presumably by design.

Finally, as the party with the burden of proof, Plaintiff's expert disclosures should come first, no matter when they are due. On Plaintiff's proposed schedule, Defendants would not receive essential information until Plaintiff's expert reports. Defendants will need time to review those reports and depose Plaintiff's experts before responding. Setting a schedule with staggered expert reports—with Defendants' reports following Plaintiff's reports—is also consistent with the expert disclosure schedules set in the MDL bellwether cases, including the Track 3 schedule negotiated by Plaintiff's counsel in this case. There is no reason to deviate from that practice, and good reason not to.

2. California Board of Pharmacy Subpoenas

Your Honor heard oral argument on the California Board of Pharmacy's Motion to Quash Defendants' subpoena on December 3, 2020. Dkt. 390. Among other things, this Court deferred

1 ruling on certain of Defendants' document requests to the Board that are similar to requests
 2 pending before the California Court of Appeal, specifically those seeking investigation files,
 3 administrative records, and CURES data. Defendants wish to bring to the Court's attention that
 4 these issues affect other outstanding subpoenas, including subpoenas to the California
 5 Department of Justice (discussed further below), the California State Medical Board, and the
 6 Dental Board of California, which also seek CURES data and investigation files. Given the
 7 importance of the information Defendants seek from these third-parties, significant delays in any
 8 rulings from the California courts may require Defendants to seek relief from the schedule.

9 **3. California Department of Justice Subpoena**

10 On behalf of Defendants, McKesson served a document subpoena on the California
 11 Department of Justice (CA DOJ) on September 22, 2020. Since that time, McKesson has met and
 12 conferred repeatedly with counsel for CA DOJ. The parties have managed to narrow the areas of
 13 dispute, but CA DOJ continues to object to producing certain categories of documents and data,
 14 including investigation files and CURES data.³ Defendants do not want to burden the Court with
 15 motion practice that, like the Board of Pharmacy discovery, the Court has determined must await
 16 resolution of the pending state court writ proceedings; but Defendants also need to ensure that
 17 they preserve their rights to enforce the subpoena. Defendants therefore request the Court's
 18 guidance on whether the disputed issues should be briefed now and held in abeyance, or deferred
 19 for the time being.

20 **4. Criminal Record Information**

21 At Plaintiff's request, the parties negotiated a stipulation regarding the production of
 22 Criminal Record Information ("CRI"). Defendants believed that negotiation was completed in
 23 November. But after Defendants provided authority for filing the stipulation with the Court,
 24 Plaintiff demanded a new provision that would require the Court to find a "compelling need"
 25 before discoverable information could be produced pursuant to the stipulation. Defendants
 26 promptly met and conferred with Plaintiff on this changed position and are working through
 27

28 ³ Although the Board of Pharmacy is in possession of some CURES data, CA DOJ has custody over the database itself.

1 various questions about it. But Defendants are concerned that Plaintiff's belated changes to this
 2 stipulation—and Plaintiff's refusal to review any documents that could contain CRI before a
 3 stipulation is entered, or even define what sort of documents it intends to withhold as containing
 4 CRI—jeopardizes the schedule.

5 **B. Status of Party Discovery**

6 **1. Defendants' Discovery Requests**

7 Defendants are meeting and conferring with Plaintiff regarding Plaintiff's responses to
 8 Walgreen's second and third requests for production and first and second set of interrogatories,
 9 and Plaintiff's responses to Distributors' first requests for production and first and second set of
 10 interrogatories. To date, Plaintiff has not produced important information required to be
 11 produced at the outset of the case, including the investigative files of the healthcare providers
 12 identified in the Plaintiff Fact Sheet as having been investigated concerning their prescribing of
 13 Prescription Opioids. Plaintiff reports that the delay is related to COVID-19. To date, Plaintiff
 14 has been unable to confirm which of its custodial files are substantially complete, but has agreed
 15 to provide this information in the near future.

16 **2. Defendants' Document Productions**

17 Plaintiff is already in possession of tens of millions of pages of documents that
 18 Defendants produced in the MDL and other opioid litigation. For certain Defendants, this
 19 includes tens of thousands of documents from custodians with information specific to
 20 San Francisco who also happen to have non-San Francisco-specific information. *See, e.g.*, ECF
 21 No. 397 at 4 n.7. Other Defendants, like Noramco, do not have custodians with information
 22 specific to San Francisco.

23 Since the last status conference, Defendants have made additional productions. These
 24 include productions by Janssen, ABDC, and Par. Certain Defendants' lack of or relatively low
 25 productions to date are largely attributable to the ongoing meet and confer process. For example,
 26 Walgreens has been negotiating with Plaintiff over the scope of production of patient prescription
 27 dispensing data for months. Plaintiff has made multiple new requests regarding the scope of that
 28 production just in the past week. Walgreens cannot agree to produce its dispensing data until

those negotiations are complete, given the sensitivity of the patient medical information contained in the data.

Moreover, the number of additional documents produced by certain Defendants in this case, as represented by Plaintiff above, is misleading and does not reflect that those documents include extensive jurisdiction-specific transactional data and Order Monitoring Program data that has been produced. Defendants will continue to work closely with Plaintiffs to finalize custodians and search terms and anticipate rolling out numerous additional productions once those negotiations are complete.

3. Plaintiff's Discovery Requests

The parties are meeting and conferring regarding responses to Plaintiff's requests for production from Teva, ABDC, Endo, Cardinal Health, Anda, Noramco, Janssen, and Walgreens. These issues are not ripe for the Court's consideration.

C. Status of Other Third-Party Discovery

At the last status conference, Plaintiff reported that it has deemed certain San Francisco departments and entities as outside of Plaintiff's custody and control. Defendants either have issued, or will issue, subpoenas to those San Francisco entities likely to have discoverable information, among other third-party subpoenas.

Since submission of the last joint case management statement, Defendants have served third-party subpoenas on Aetna, Anthem Blue Cross Life & Health Insurance, Co., Blue Shield of California, California Public Employees' Retirement System, Cigna Health & Life Insurance, Co., OptumRx, Express Scripts, Inc., University of California San Francisco Office of Medical Affairs & Governance, and the San Francisco District Attorney. Service of certain other third-party discovery has been delayed due to COVID-19.

DATED: December 17, 2020

Respectfully submitted,

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1 DATED: December 17, 2020

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ATTESTATION

Pursuant to Civil L.R. 5-1(i)(3), I hereby attest that concurrence in the filing of this document has been obtained from the above signatories.

Dated: December 17, 2020

By: /s/ Elizabeth J. Cabraser

CERTIFICATE OF SERVICE

I hereby certify that, on December 17, 2020, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ Elizabeth J. Cabraser
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